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| DAMIEN MATHIS, | : | CIVIL ACTION |
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| Plaintiff, | : | |
| | : | |
| v. | : | No. 00-2505 |
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| NATHANIEL CHAPMAN, JOHN TIMONEY, | : | |
| Commissioner of the Philadelphia | : | |
| Police Department, and THE CITY | : | |
| OF PHILADELPHIA, | : | |
| | : | |
| Defendants. | : | |
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Presently before this Court is Plaintiff Damien Mathis' ("Mathis") Motion for Reconsideration of this Court's Orders dated March 19, 2001 dismissing the case as time barred against Defendants John Timoney ("Timoney") and the City of Philadelphia (the "City") (or collectively the "Municipal Defendants") (Dkt. No. 10), and dismissing the case against Nathaniel Chatman ("Chatman") (erroneously named "Chapman" in the Complaint and caption) due to Plaintiff's lack of prosecution for failure to make service of the Complaint in accordance with Rule 4(m) of the Federal Rules of Civil Procedure (Dkt. No. 11). Because there is a need to prevent manifest injustice in light of the evidence that the claim is not time barred and service of the Complaint was made, the Motion for Reconsideration is granted. However, because Mathis' Motion for Reconsideration is granted, this Court will entertain the Motion for Summary Judgment filed by the

Municipal Defendants. After reviewing all of the relevant briefs and documentation and after the May 17, 2001 hearing, the Motion for Summary Judgment filed by the Municipal Defendants is granted.

I. FACTS

When considering a motion for summary judgment, all reasonable inferences must be made in favor of the non-moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Therefore the following facts have been taken from the Complaint. On or about August 17, 1997, Mathis was sitting on the steps to his apartment building while intoxicated. When Mathis was unable to gain entrance into the apartment building due to the intoxication, he asked Chatman, an off duty Philadelphia police officer who was walking by, for assistance. Chatman responded with profanity and declined to help. An altercation ensued between Mathis and Chatman which culminated with Mathis striking Chatman in the face. Chatman then informed Mathis that he was a police officer and that Mathis was under arrest for assault. Mathis then ran back towards the apartment building at which time Chatman shot Mathis with a .22 caliber handgun as Mathis ran away. Mathis alleges that Chatman was not disciplined by the City for shooting him.

On May 16, 2000, Mathis filed his Complaint with this Court. Mathis argues in the Complaint that under 42 U.S.C.

section 1983 ("§ 1983"), his civil rights were violated when Chatman used excessive force and shot him. Mathis alleges that Timoney instructed off-duty police officers to be aggressive in arresting suspects and that as a result, a custom was established where police officers, such as Chatman, used excessive force in violation of Mathis' Fourth and Fourteenth Amendment rights. Mathis further alleges that the City inadequately investigated, trained, supervised and disciplined its off-duty police officers which also resulted in the customary use of excessive force.

On February 27, 2001, the Municipal Defendants filed a Motion to Dismiss or alternatively for Summary Judgment. On March 19, 2001, this Court granted the Motion to Dismiss based on the apparent running of the statute of limitations. Also on March 19, 2001, this Court ordered the case dismissed against Chatman due to Plaintiff's apparent lack of prosecution for failure to make service of the Complaint in accordance with Rule 4(m) of the Federal Rules of Civil Procedure. Mathis filed an answer to the Municipal Defendants' Motion to Dismiss on March 19, 2001. By Order dated March 26, 2001, this Court construed Plaintiff's Reply as a Motion for Reconsideration of this Court's March 19, 2001 Orders. On May 17, 2001, a hearing was held on the Motion for Reconsideration and Motion for Summary Judgment.

II. STANDARDS

A. Reconsideration

A motion for reconsideration is appropriate only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is need to correct a clear error of law or prevent manifest injustice. N. River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1218 (3rd Cir. 1995). However, such motions should only be granted sparingly. Armstrong v. Reisman, No. 99-4188, 2000 WL 288243 at *2 (E.D. Pa. Mar. 7, 2000).

B. Summary Judgment

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Further, the non-moving party has the burden of producing evidence to establish prima facie each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION

A. Reconsideration

1. Statute of Limitations

Generally, cases brought under § 1983 applying Pennsylvania law, must be commenced within two years of the date the action accrued. 42 Pa. C.S.A § 5524(1); Rose v. Bartle, 871 F.2d 331, 347 n. 13 (3rd Cir. 1989). However, a minor may file such an action within two years of his or her eighteenth birthday. 42 Pa. C.S.A. § 5533(b). Mathis was a minor on August 17, 1997, the date of the incident. On June 9, 1998, Mathis reached the age of eighteen.¹ The Complaint was filed on May 16,

¹ According to Mathis' birth certificate, he was born on June 9, 1980.

2000. Therefore, Mathis filed the action within two years of his eighteenth birthday, and his claims are not time barred. In order to prevent manifest injustice, this Court's March 19, 2001 Order granting the Municipal Defendant's Motion to Dismiss based on the premise that the statute of limitations had run, must be reconsidered and vacated.

2. Failure to Make Service of the Complaint

According to Federal Rule of Civil Procedure 4(m), service of the summons and complaint must be made upon a defendant within 120 days after filing the complaint. FED R. CIV. P. 4(m). In order to be timely, service in this action must have been made by September 13, 2000. According to the Civil Process Return attached to Mathis' Motion for Reconsideration as Exhibit A, "Keneisha Chapman, age 19" was served with Chatman's copy of the Summons and Complaint on September 13, 2000, at "5638 Osage Avenue, Philadelphia". Apparently however, proof of service was not filed with the Clerk's Office until May 24, 2001 as required by Federal Rule of Civil Procedure 4(l) and therefore this Court was unaware that Chatman had been served. In order to prevent manifest injustice, this Court's March 19, 2001 Order dismissing the case as to Chatman due to Plaintiff's lack of prosecution for failure to make service of the Complaint, must be reconsidered and vacated.

B. Summary Judgment

In a § 1983 case, the Municipal Defendants cannot be held liable under a theory of respondent superior. Monell v. Dept. of Soc. Serv. of the City of N.Y., 436 U.S. 658, 691 (1978). Instead, Mathis must demonstrate that the violation of his rights was caused by either a policy or a custom of the Municipal Defendants.² Berg v. County of Allegheny, 219 F.3d 261, 275 (3rd Cir. 2000); cert. denied ___ U.S. ___, 121 S. Ct. 762 (2001). Here, Mathis alleges that there was a custom of allowing the use of excessive force which deprived him of his rights.

There are two ways that Mathis can demonstrate the existence of a custom. First, custom "can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." Bielewicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990). Alternatively, "[c]ustom ... may also be established by evidence of knowledge and acquiescence" by the final policymakers. Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996). A plaintiff cannot prove a custom base simply on one instance of the custom. Groman v. Twp. of Manalapan, 47 F.3d 628, 637 (3d Cir. 1995). However, if the plaintiff can show

² For the purposes of this Opinion only, we will assume that Chatman acted under the color of law and that his acts violated Mathis' constitutional rights.

that a well-settled custom exists, and that the municipality has not attempted to rectify the custom, then the custom may be attributed to the municipality. See Bielewicz, 915 F.2d at 852-53.

Under § 1983, the finding of a custom does not end the analysis, however. Mathis must also show that "through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Bd. of County Comm'rs of Bryan City v. Brown, 520 U.S. 397, 404 (1997). In order to establish the culpability and causation requirements in a case such as this, where the plaintiff alleges that the custom caused an employee to violate the plaintiff's constitutional rights, "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees." Id. at 405. Thus,

a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice.

Id. at 407 (quoting Canton v. Harris, 489 U.S. 378, 388 (1989)).

Mathis first argues that the Municipal Defendants' "failure to terminate Officer Chatman's position after instances which demonstrated that he was unfit to be a police officer represents the existence of a practice that acquiesces [sic] police misconduct which in turn motivate [sic] police officers, on and off-duty, to use unreasonable excess deadly force when apprehending suspects." (Pl.'s Mot. for Recons. at 8). Mathis supports his claim with three records from Chatman's police file. The first record is a notice during Chatman's police training, dated May 19, 1988, recognizing that he failed courses in Crimes Code, Search and Seizure, First Aid and Defensive Tactics, and that he was requesting a leave of absence without pay in order to retake the failed subjects. (Id., Ex. C). The second record is a notice of suspension without pay for one day for conduct unbecoming an officer. (Id., Ex. D). The notice states that on June 13, 1994, while on School Detail, Chatman was called into a classroom by a teacher to remove a magic marker from a student. (Id.). In order to obtain the magic marker, Chatman slapped the student in the face. (Id.). The final record is an official reprimand dated April 30, 1998 for neglect of duty. (Id., Ex. E) The reprimand states that Chatman was involved in a an accident which was found to be preventable by the Safety Review Board. (Id.).

These three documents fail to establish that there was a custom of allowing the use of excessive force that was so well-settled and permanent as virtually to constitute law. Only the notice of suspension could possibly be said to support evidence of excessive force. However, a plaintiff cannot prove a custom based simply on one instance of the custom. Groman, 47 F.3d at 637. These documents also do not establish evidence that the Municipal Defendants knew of the alleged practice and acquiesced to it. Furthermore, even if custom was established, the reports do not show that the Municipal Defendants were deliberately indifferent to the known or obvious consequences of the custom. This is especially evident since each document represents a corrective or disciplinary measure taken by the Municipal Defendants to rectify substandard conduct. Therefore, contrary to Mathis' argument, these documents do not establish that Chatman was unfit as an officer or that customs existed which caused his constitutional rights to be violated, but merely establish that the Municipal Defendants took appropriate measures to address problems and did not acquiesce to a custom of allowing excessive force.

Second, Mathis submits a March 2001 report ("report") from the Integrity and Accountability Office ("IAO") which he argues establishes that the Municipal Defendants do not properly discipline their officers which leads to a custom of the use of

excessive force.³ Pursuant to a settlement agreement between the City and various plaintiffs, the IAO, an independent monitoring agency, was established "to analyze and critique accountability and corruption control policies, to identify systemic deficiencies that give rise to or permit corruption and misconduct within the Police Department, and to make recommendations for change." (Pl.'s Supp. Resp. to Def.'s Mot. for Summ. J., Ex. at 1). The report states that,

by virtue of our essential function to monitor and audit the Police Department, and in order to remain effective and credible, the IAO must exercise independent judgment in reporting findings and making recommendations. This independence also means that the IAO analyses, critiques, and recommendations are solely those of the IAO. This report should not be read as expressing the policies or positions of the government of the City of Philadelphia, or the opinions, views or beliefs of the Mayor, the Police Commissioner, the City Solicitor, or any other official of the City of Philadelphia.

(Id. at 2). Contrary to Mathis' arguments, the IAO found that "in both policy and practice, the Philadelphia Police Department is currently intolerant of serious corruption that has been identified and proven. Officers whose conduct is criminal and

³ Mathis also argues that statements allegedly made by Timoney support this argument. However, while Mathis does provide an alleged quote from Timoney, he does not document or verify the quote and thus it is speculative. Speculative assertions may not be used to defend against a motion for summary judgment. Jersey Cent. Power & Light Co. v. Lacey Tp., 772 F.2d 1103, 1109 (3rd. 1985).

corrupt are dismissed from the force and prosecuted if warranted." (Id. at 4). The report also states that it "identified a well entrenched disciplinary system enhanced by several recently instituted reforms . . . that have contributed to the overall effectiveness of the disciplinary system." (Id.) However, the report does state that there are

deficiencies in the disciplinary system and a lack of clarity in the Department's disciplinary standards which undermine the overall effectiveness of the disciplinary system, contribute to a system that is somewhat inscrutable, inconsistent and lacking in focus, and validate and perpetuate the widespread organizational perception that discipline is meted out selectively and capriciously. Some of the problems identified in this report have developed over decades and can be attributed to an increasing number of restrictions and limitations placed on the Department's ability to manage its personnel as a result of management concessions in labor contract negotiations. The solutions to some of these problems are therefore not conducive to quick fixes or easy resolution.

(Id. at 5).

According to the report, problems exist within the Philadelphia Police Department's disciplinary system. The report also outlines procedures that could be implemented to improve the system. However, the report states that the issues are being addressed and changes have, and are being, implemented to make the system better. Furthermore, the report does not establish a course of conduct violative of citizens' rights which is so well-

settled and permanent as virtually to constitute law. In fact, the report specifically "identified a well entrenched disciplinary system enhanced by several recently instituted reforms." (Id. at 4). Furthermore, the report does not establish that the Municipal Defendants had knowledge of such a custom and acquiesced to that custom.

Regardless, as stated earlier, "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees." Brown, 520 U.S. at 405. The report does not establish that the Municipal Defendants were the moving force behind the injury alleged or that they were deliberately indifferent to the consequences of the conduct. The report simply establishes that while there is a disciplinary system in place, and regular reforms have been made to improve it, there are still issues that need to be addressed in order to make the system fully viable.

IV. CONCLUSION

In this case, there is no genuine issue of material fact concerning Mathis' § 1983 claim against the Municipal Defendants. Mathis has not met his burden of producing evidence to establish prima facie each element of his § 1983 claim against the Municipal Defendants. The three documents and the report do not establish a custom violative of constitutional rights and

they do not establish that the Municipal Defendants were deliberately indifferent to the use of excessive force to apprehend suspects. After viewing all reasonable inferences in favor of Mathis, this Court has determined that there is no genuine issue of material fact. Therefore summary judgment is proper.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| DAMIEN MATHIS, | : | |
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| Plaintiff, | : | CIVIL ACTION |
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| v. | : | No. 00-2505 |
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| NATHANIEL CHAPMAN, JOHN TIMONEY, | : | |
| Commissioner of the Philadelphia | : | |
| Police Department, and THE CITY | : | |
| OF PHILADELPHIA, | : | |
| | : | |
| Defendants. | : | |
| | : | |

ORDER

AND NOW, this 26th day of June, 2001, upon consideration of Damien Mathis' ("Mathis") Motion for Reconsideration of this Court's March 19, 2001 Orders dismissing the case as time barred against Defendants John Timoney and the City of Philadelphia ("Municipal Defendants") and dismissing the case against Nathaniel Chatman ("Chatman") due to Plaintiff's lack of prosecution for failure to make service of the Complaint in accordance with Rule 4(m) of the Federal Rules of Civil Procedure (Dkt. No. 13); the Municipal Defendant's Motion for Summary Judgment (Dkt. No. 9); and Mathis' Motion for Default Judgment Against Chatman (Dkt. No. 21), and any Responses thereto, it is hereby ORDERED that:

1. Plaintiff's Motion for Reconsideration is GRANTED;
2. this Court's March 19, 2001 Orders (Dkt. Nos. 10 and 11) dismissing Plaintiff's case against the Municipal Defendants and Chatman are vacated and the case shall be reopened;

3. the Municipal Defendant's Motion for Summary Judgment is GRANTED and Plaintiff's claims against them are dismissed with prejudice;

4. Mathis' Motion for Default Judgment against Chatman is DENIED; and

5. Chatman shall have ten (10) days in which to file an Answer to the Complaint.

BY THE COURT:

ROBERT F. KELLY,

J.